Supreme Court, U.S
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IN THE

Supreme Court of the United States

P.J., A MINOR, BY HIS NEXT FRIEND,
Petitioners

v.

EAGLE-UNION COMMUNITY SCHOOL CORPORATION

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

P.J.
P.O.Box 30068
Indianapolis, Indiana 46230
317 846-5487

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QUESTIONS PRESENTED

1. Whether a school corporation that receives federal financial assistance under IDEA must proceed under IDEA regulations to gain permission for a school staff recommended IDEA psychological evaluation of a student for severe emotional disability despite parental objection.

2. Whether such a school corporation has a duty to timely perform an IDEA and/or a Section 504 evaluation of a student when a school corporation's teachers, guidance counselor, and special education school psychologist documented concerns about the student in a written IDEA referral for evaluation for severe emotional disability, suicidal ideation, and social isolation.

3. Whether a school corporation's failure to timely identify or evaluate a student suspected of having a severe emotional disability is a violation of federal regulations and procedural safeguards of the Acts.

4. Whether a school corporation's acts and failures or willful refusals to act constituted a discriminatory denial of a free, appropriate public education.

5. Whether a school corporation can properly defend a school corporation's failure to identify or evaluate the student's emotional disability due to the student's lack of any dyslexic "learning disability", the student's superior mathematical performance, and/or parental intransigence.

PARTIES TO THE PROCEEDINGS

P.J., A Minor, By His Next Friend v. Eagle Union Community School Corporation,[1]

Petitioners:

P.J. , Having now reached age of majority, in his own right;
P.J., A Minor, By His Next Friend;
P.J.'s Parents as Next Friend and in their own right.

Respondent:

Eagle-Union Community School Corporation,
Eagle-Union Community School Corporation Board of Trustees

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[1] The names of the real parties in interest were filed under seal due to the provisions of FERPA Family Education Rights to Privacy Act which protects such personally identifiable information. The trial court judge has ordered the parties not to reveal personally identifiable information. The administrative hearing below was closed to the public. The Student, having reached the age of majority, appears also as P.J. in his own right.

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Petition for Writ of Certiorari

Petitioner, PJ respectfully prays that a writ of certitorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on November 17,1999 and December 21,1999.

Jurisdictional Statement

The date of the United States Court of Appeals for the Seventh Circuit order sought to be reviewed was dated November 17, 1999 and the date of the United States Court of Appeals for the Seventh Circuit order denying rehearing was December 21,1999. This Court has jurisdiction to review on a writ of certiorari the judgment in question under 28 U.S.C.§1254(1). The U.S. District Court had jurisdiction over the Petitioners PJ's claims in the case based on federal question 28 U.S.C.1331 28 and U.S.C.§1443 in that PJ's presented issues under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.§1400 *et seq.*) §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) ("Section 504", the Americans with Disabilities Act (42 U.S.C.§12100 *et seq.*) ("ADA"), and the Due Process Clause of the Fourteenth Amendment through 42 U.S.C. §1983. The U.S. Court of Appeals had jurisdiction over this matter as a consequence of 28 U.S.C. §1291. This Court has jurisdiction to review on a writ of certiorari the judgment in question under 28 U.S.C.§1254(1).

Constitutional Provisions, Statutes and Regulations Involved

Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.§1400 *et seq.*) Article 7 Indiana's regulations implementing the Act, Ind. Admin. Code tit. 511, r. 7.

§504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) ("Section 504"),

The Americans with Disabilities Act (42 U.S.C.§12100 *et seq.*) ("ADA"),
and the Due Process Clause of the Fourteenth Amendment through 42 U.S.C. §1983. See Appendix.

Statement of the Case

Concerned about the student PJ 's performance, suicidal ideation and isolation, Eagle-Union school teachers, counselors and officials repeatedly asked the student's parent for permission to evaluate him for IDEA Article 7 for special education services under the category of severe emotional disability (511 IAC 7) in 1993-1994, and 1994-1995 school years. The Eagle-Union School Counselor officially referred the student PJ for an IDEA evaluation on November 22,1994.

P.J's parents subsequently provided Eagle-Union School Corporation a written authorization on February 25, 1995 of parental permission to evaluate PJ for severe emotional disability. However, the School and the parents could not come to agreement on the credentials of the IDEA psychological evaluator to evaluate PJ. Confidentiality issues arose over the student's private medical records, in particular, the school's written request for the psychological treatment records.

No IDEA evaluation was ever done by the School Corporation. However, a plan with a list of classroom accommodations and supports was drawn up for PJ by the school's conference committee. But the plan was only partially implemented by the school during 1995 and 1996.

Administrative Proceedings

The Petitioner PJ requested an IDEA / Section 504 hearing over the identification and evaluation issues, denial of free, appropriate education public education and procedural safeguards. The administrative hearing officer found that PJ was not "eligible" for IDEA services because PJ had not been officially "identified" as IDEA or Section 504 by the school.

The Petitioner appealed to Indiana Board of Special Education Appeals (BSEA). The BSEA affirmed the hearing officer's decision refusing to consider medical evidence of PJ's eligibility submitted on the record in the appeal despite the such evidence clarifying the scope and the chronic nature of the student's medical condition, the student's long-standing history of disability and treatment during 1994-1997 and severity of the diagnoses. The BSEA based the BSEA's refusal to consider evidence of PJ's disability on parental lack of due diligence in the administrative hearing below.

The BSEA refused to consider the procedural irregularities of the administrative hearing raised by the Petitioner, most notably the hearing officer's refusal to stop the hearing at Petitioner's request to obtain legal representation when the school attorney threatened to circulate PJ's complete psychological record as an educational records if the Petitioner submitted them as evidence at the closed hearing.

Administrative Record 1625-1627.

Judicial Review

The Petitioner sought judicial review of the administrative hearing and BSEA decision in U.S. District Court. The Petitioner and the school filed cross-motions for summary judgment. The district court judge granted summary judgment for the school finding that PJ's parent had "deflected, ignored or rejected" all prior school requests to evaluate PJ.

The district court judge based his summary judgment decision on PJ's parents' failure to provide an IDEA evaluation to the school. Despite the school's prior notice under the IDEA regulations by the school's written referral of PJ for an IDEA evaluation, the district court judge decided that there was no denial of due process.

The Petitioner appealed the district court's granting of the school's motion for summary judgment to the U.S. Court of Appeals for the Seventh Circuit. The U.S.Court of Appeals for the Seventh Circuit affirmed the district court's granting of summary judgment for the school on the basis of three findings PJ's mathematics skill , parental refusal of services, and lack of "learning disability" diagnosis.

The U.S. Court of Appeals for the Seventh Circuit attempts to harmonize the opposite outcome in a case decided by the U.S. Court of Appeals for the First Circuit regarding parental intransigence on the basis of state variance of implementing statute. Murphy v. Timberlane Regional School District, 22F. 3d 1186 (1st Circuit 1994).

The Petitioner PJ filed a petition for rehearing which

was denied by the U.S. Court of Appeals for the Seventh Circuit. The Petitioner PJ respectfully submits this petition for writ of certiorari to review the judgment of U.S. Court of Appeals for the Seventh Circuit.

Basis for Federal Jurisdiction

The U.S. District Court had jurisdiction over the Petitioners PJ's claims in the case based on federal question 28 U.S.C.1331 28 and U.S.C.§1443 in that PJ's presented issues under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.§1400 *et seq.*) §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) ("Section 504", the Americans with Disabilities Act (42 U.S.C.§12100 *et seq.*) ("ADA"), and the Due Process Clause of the Fourteenth Amendment through 42 U.S.C. §1983.

Argument

The United States Court of Appeals for the Seventh Circuit has entered a decision in conflict with a decision of the United States Court of Appeals for the First Circuit on the same important federal matter of school and parent responsibility in IDEA conflicts. Murphy v. Timberlane Regional School District, 20 IDELR 1391. The United States Court of Appeals for the Seventh Circuit has entered a decision on the important matter that has not been, but should be settled by this Court, namely the correct defining of accountability for the identification and evaluation of students with severe emotional disabilities and the provision of a free, appropriate public education to student with such disabilities.

The United States Court of Appeals for the Seventh Circuit has entered a decision on the important matter of that conflicts with relevant decisions of this Court. The Court of Appeals in the instant case has accepted the trial court's notion that the responsibility for evaluation and identification of students with disabilities is shared between parents and school.

This notion is incorrect. While IDEA attempts to foster agreement between schools and parents on accommodations and plans, there can be no agreement between a school corporation and parents not to serve a child with a severe emotional disability based on parental objection to the student be labeled or classified.

Congress contemplated parental resistance to labeling and classification of children as "special education" or "severely emotionally disabled". So Congress put the onus on schools to overcome parental objection to IDEA evaluation or seek administrative permission to do the proposed evaluation. Both IDEA and Indiana's implementing statute overcome parental intransigence. See 511 IAC 7-49

This Court has previously said that the provision of a free appropriate public education is predicated on educational agencies following the IDEA regulations and procedural safeguards and if those are not met or adhered to by the education agency, there is a denial of a free, appropriate public education. IDEA 34 CFR § 300. 527

The United States Court of Appeals for the Seventh Circuit has sanctioned proceedings below that call for an exercise of this Court's supervisory power particularly on the vitally important issue of identifying severely emotionally disabled students given the competing duty of schools to

identify and serve students with severe emotional problems and the privacy issues of the students with severe emotional disabilities.

Despite repeated written school teachers' concerns, written school staff and a written parent request to have the student evaluated, the school has never completed an IDEA evaluation of the student. At law, it is undisputed that in the instant case the school either had prior actual or constructive notice that the student had a history of disability when the school subjected the student to exclusion.

Parental Intransigence

The school maintained that the school's hands were tied claiming the parents were intransigent and alleged that the parents refused to allow the student to be evaluated despite the school's uncontroverted acknowledged receipt of the written parental consent for the evaluation on February 25, 1995. The School improperly denied the student the procedural protections of the Acts.

The federal IDEA regulations requiring schools to evaluate upon notice prevail over any state mirror statutes. The First Circuit decision reflects the law of the IDEA, not a state implementing statutory "quirk". Murphy v. Timberlane Regional School District.

Notice

The school corporation is charged with irrefutable notice that a student may have a severe emotional disability if school teachers and staff make repeated written referrals requesting the student be evaluated under Individuals with

Disabilities in Education Act. There is no relevance or legal significance to a finding that the student can not be classified as "learning disabled" given that the Indiana IDEA statutory definition does not permit the classification of "learning disabled" if the student's problems are related to emotional disability.

Conclusion

The school corporation by operation of the IDEA regulations and Indiana implementing regulations is charged with irrefutable notice that a student may have a severe emotional disability. Notice that a student may have a severe emotional disability requires the school to evaluate to either determine the nature and extent to the disabling condition and the history of disability for Section 504 identification or to rule out the existence of disability.

The student's superior intelligence, academic progress in mathematics and lack of dyslexia or other "learning disability' is not relevant to the determination of the student's eligibility either under Section 504 or IDEA for emotional disability. Both IDEA and Section 504 provide schools ways to meet the needs of individual students with severe emotional disabilities and can not be excused by the school corporation's claim of inability to obtain parental consent. For these reasons the Petitioner PJ's petition for writ of certiorari should be granted.

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Submitted November 15, 1999 *
Decided November 17, 1999

Before

Hon. WILLIAM J. BAUER, Circuit Judge,
Hon. JOHN L. COFFEY, Circuit Judge,
Hon. DANIEL A. MANION, Circuit Judge.

No. 99-2079
P.J., A MINOR, BY HIS NEXT FRIEND,
Plaintiff-Appellant,

v.

EAGLE-UNION COMMUNITY SCHOOL CORPORATION,
Defendant-Appellee,

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 97-C-1144. John D. Tinder, Judge. OPINION: ORDER

DISPOSITION: AFFIRMED.

COUNSEL:

P.J., Plaintiff - Appellant, Pro se, Indianapolis, IN.

For EAGLE-UNION COMMUNITY SCHOOL CORPORATION, Defendant - Appellee: DonaldL. Dawson, KIGHTLINGER & GRAY, Thomas E. Wheeler, II, BOSE,

MCKINNEY &EVANS, Indianapolis, IN USA

For EAGLE-UNION COMMUNITY SCHOOL CORPORATION, Defendant - Appellee: Jack G. Hittle, CHURCH, CHURCH, HITTLE & ANTRIM, Noblesville, IN USA.

P.J., a public school student, brought suit alleging that the Eagle-Union Community School Corporation ("Eagle-Union") failed to identify him as having a serious emotional disturbance requiring special education and related services, in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1412 (a)(3)(A), and Indiana's regulations implementing the Act, Ind. Admin. Code tit. 511, r. 7. The district court granted summary judgment to Eagle-Union. P.J. appeals and we affirm.

I.

Born in 1980, P.J. never exhibited any difficulties with school until the seventh grade when he was the victim of a hazing incident at the private school he attended in Indianapolis. As a result of the hazing incident, P.J.'s parents moved to Zionsville, Indiana, and enrolled him in Eagle-Union's Middle School. As an eighth-grade student during the 1994-95 school year, P.J. earned poor grades and did not interact well with the other children.

Concerned about P.J.'s performance and *isolation*, school officials repeatedly asked P.J.'s mother for permission to evaluate him for special education services. Although P.J's mother provided written authorization in February 1995, she subsequently withdrew her consent at the initial evaluation session. She expressed concerns about confidentiality and that the evaluation might result in P.J. being labeled in a way that would damage his chances of being re-admitted to private school. She refused to share P.J.'s medical records with school officials. However, a pediatric neurologist who had examined P.J. informed school officials that P.J.was "not learning disabled." Due to the neurologist's diagnosis and his mother's unwillingness to have P.J. evaluated, school officials implemented a general education intervention ("GEI") plan for P.J. as a student experiencing educational difficulties, but not yet eligible for special education services.

The next school year, 1995-96, P.J. enrolled as a freshman at Eagle-Union's Zionsville High School. After Middle School officials alerted high school officials to the problems P.J. had experienced, high school officials identified P.J. early in the academic year as a student who might be eligible for special education services. A school official contacted P.J.'s mother about evaluating him, but she responded that he was neither experiencing academic problems nor was he disabled. During his freshman year P.J. made the Honor Roll, played on the freshman basketball team, and developed friendships with his classmates.

At the start of his sophomore year, school officials offered P.J. a special study hall due to his poor performance

in Middle School. P.J. and his mother declined the offer. In November 1996, the coaching staff cut P.J.from the junior varsity basketball team because he did not have the skill to play at that level. Following being dropped from the team, P.J. started playing basketball during his lunch period to impress the coach who supervised the gym. As a result, P.J. was repeatedly tardy for Geometry class in violation of school rules. After each late arrival, school officials reprimanded P.J. After his sixth tardy, school officials withdrew P.J. from the class on December 4, 1996, in accordance with school policy. At a meeting with school officials two days later, P.J.'s mother claimed he had a disability and consented to his being evaluated. She also agreed to give P.J.'s medical records to school officials. On December 9, 1996, P.J.'s mother refused to sign the evaluation consent form, or to provide the medical records supporting her disability claim. P.J. then sought emergency injunctive relief in federal district court which was denied because he had not pursued his state administrative remedies.

In January 1997, P.J.'s mother requested a due process hearing from the Indiana Department of Education (IDOE). She complained that Eagle-Union had violated the IDEA by failing to identify P.J. as a child in need of special education services. She further alleged that Eagle-Union had violated P.J.'s rights under the IDEA and the Rehabilitation Act, 29 U.S.C. § 794, by withdrawing him from Geometry class and cutting him from the junior varsity basketball team.

An independent hearing officer (IHO) conducted a four-day hearing in February 1997. In March 1997, the IHO issued his decision, finding that Eagle-Union had not failed to

identify P.J. as a child with special education needs. Instead, the IHO found that Eagle-Union had made every effort to assist P.J. and to secure his parents' permission to evaluate him.The IHO also concluded that Eagle-Union had not violated P.J.'s rights under the IDEA or the Rehabilitation Act when it applied the tardiness policy to him or cut him from the basketball team. In addition, the IHO found that Eagle-Union had provided P.J. and his parents procedural due process as required by IDEA and the Rehabilitation Act.

In May 1997, P.J.'s mother petitioned the Indiana Boarrd of Special Education Appeals (IBSEA) for review of the IHO's decision. In June 1997, the IBSEA affirmed the IHO's decision and P.J. brought this action in district court seeking review of the IBSEA decision. P.J. and Eagle-Union filed cross-motions for summary judgment. In March 1999, the district court granted summary judgment to Eagle-Union, affirming the decisions of the IHO and IBSEA.

II

P.J. contends that the district court should have granted his motion for summary judgment instead of Eagle-Union's. He raises 16 issues that can be grouped into the following four arguments: 1) the district court erred by not finding that Eagle-Union had failed to identify him as a child in need of special education services; 2) the district court erred in concluding that Eagle-Union was not obligated to compel an evaluation of P.J. given his parents' unwillingness to consent to one; 3) the district court erred in finding that Eagle-Union did not violate P.J.'s due process rights in withdrawing him from Geometry class and dropping him from the junior varsity basketball team; and 4) the district court abused its discretion by not allowing P.J. to introduce new evidence. Our standard

of review in cases brought under the IDEA differs from the one we typically employ in evaluating a district court's grant of summary judgment. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1052 (7th Cir. 1997). When no new evidence is presented to the district court in an IDEA case, as was the situation here, "the motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." Id. (quotation and citation omitted). Thus, although it is termed summary judgment, the district court's decision is based on the preponderance of the evidence. Heather S., 125 F.3d at 1052. Even though we review the district court's judgment de novo, unless there is a mistake of law, we reverse only if the district court's findings were clearly erroneous. Id.

With respect to his first argument, P.J. argues that the evidence does not support the district court's finding that Eagle-Union did not fail to identify him as a child in need of special education services. The purposeof the IDEA is to "assure that all children with disabilities have available to them . . . a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). To qualify for federal assistance under IDEA, states must comply with certain requirements, including identifying, locating, and evaluating all disabled children who are in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). Indiana has developed numerous ways of satisfying the "child find" mandate. Ind. Admin. Code tit. 511, r 7-10. The district court must give "'due weight'" to the administrative decision,

and not "'substitute [its] own notions of sound educational policy for those of the school authorities.'" Heather S., 125 F.3d at 1052-53 (quoting Board of Educ. of Hendrick Hudson Edu. Sch. Dist. v. Rowley, 458 U.S. 176, 202, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)). As the party challenging the outcome of the state administrative decision, P.J. bore the burden of proof. Heather S., 125 F.3d at 1052. The district court found that P.J. had not met his burden, and that the evidence supported the IHO and IBSEA's decision that Eagle-Union had not failed to identify P.J. as a child in need of special education services. We agree. In light of P.J.'s improved performance during his freshman year, his pediatric neurologist's diagnosis that he was "not learning disabled," and his parents' failure to accept extra services that the schools offered, it was not clearly erroneous for the district court to conclude that Eagle-Union had not failed to identify him as in need of special education services. See Rodiriecus L. v. Waukegan Sch. Dist. No. 60, 90 F.3d 249, 254 (7th Cir. 1996) (no basis for school to suspect disability when student's academic performance is average and student's guardian never requested special education services).

P.J. next contends that the district court erred in partially basing its finding that Eagle-Union did not fail to identify him on the fact that his parents "deflected, ignored or rejected several initiatives by the school to evaluate, or at least explore, P.J.'s need for educational services." P.J. argues that his parents' objection did not absolve Eagle-Union from its responsibility under the IDEA to evaluate him. In support of this proposition P.J. cites Murphy v. Timberlane Regional School District, 22F.3d 1186 (1st Cir. 1994). The First

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P.J., A MINOR, BY HIS NEXT FRIEND, Plaintiff-Appellant, v. EAGLE-UNION COMMUNITY SCHOOL CORPORATION, Defendant-Appellee,

No. 99-2079

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOHN L. COFFEY,
Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge.

OPINION: ORDER

Rehearing Denied

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PJ, A Minor by his Next Friend, Plaintiff,

vs.

EAGLE-UNION COMMUNITY SCHOOL CORPORATION, Defendant.

No. IP 97-1144-C-T/

ENTRY DISCUSSING MOTIONS FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF JUDGMENT

I. Introduction

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491, requires states, as a condition of receipt of certain federal funds, to ensure that all handicapped children have available to them a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(2)(B). One aspect of the IDEA is its mandate that states ensure that all disabled children who are in need of special education and related services are "identified, located and evaluated." 20 U.S.C. § 1412(a)(3)(A).

Plaintiff PJ, a minor at the time this action was filed, seeks judicial review of a decision of the Indiana Board of Special Education Appeals (BSEA), finding that Eagle Union Community School District ("School" or "Eagle-Union") did not fail to identify him as having a emotional disturbance requiring special education and related services. The court has jurisdiction pursuant to 20 U.S.C. § 1415(e)(2) (right to bring

a civil action under the IDEA), and under related legislation. Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052,1053 (7th Cir.), ceff. denied, 115 U.S. 420 (1994).

The pleadings in this action have been expanded to include the administrative record from the proceedings before the independent hearing officer (IHO) and the BSEA. Both parties have filed motions for summary judgment. In addition, the School has moved to strike portions of the material relied on by PJ in opposition to the School's motion for summary judgment.

For the reasons explained in this Entry, the School's motion for summary judgment and motion to strike must be granted. PJ's motion for summary judgment must be denied.

II. Summary Judgment Standard

A. Methodology in IDEA Case

The particular setting of judicial review in an IDEA case requires an understanding of how the summary judgment standard is applied. A district court reviewing an administrative decision "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Where the court's task is to review an administrative record and decision to determine whetherthe decision is supported by substantial evidence and is otherwise according to law, summary judgment is ordinarily a useful vehicle. See, e.g., Hungerv. Leininger, 15 F.3d 664, 669 (7th Cir.1994).

In reviewing a state agency's decision underthe IDEA, the court's role is not merely to determine whether the administrative findings are supported by substantial evidence and otherwise in accordance with law. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). In cases challenging administrative decisions under the IDEA, a district court must independently determine whether the IDEA's requirements have been satisfied. Board of Educ. of Murphysboro v. Illinois State Bd. of Educ., 41 F.3d 1162,1166 (7th Cir.1994). Pointing out that courts have no special expertise in educational policy, the Supreme Court has instructed that the lower courts must give "due weight" to the results of the administrative process, and should not "substitute their own notions of sound educational policy for those of the school authorities which they review." Rowley, 458 U.S. at 206; see also Board of Educ. of Murphysboro, 41 F.3d at 1166. The Seventh Circuit has squarely held that the party challenging the administrative decision has the burden of proof. Id. at 1167; Board of Educ. of Sch. Dist. No. 21 v. Illinois State Bd. of Educ., 938 F.2d 712,716 (7th Cir.1991). "The purpose of the 'due weight' obligation is to prevent the court from imposing its view of preferable educational methods on the states." Oberti v. Board of Education, 995 F.2d 1204, 1219 (3d Cir.1993)(citing Rowley, 458 U .S. at 207)).

B. Motion to Strike

The School has filed a motion to strike certain materials relied on by PJ in conjunction with PJ's own motion for summary judgment and in his opposition to the School's motion for summary judgment. It was agreed at a pretrial conference that the disposition of this action would be based on the

evidence submitted through the course of the administrative review by the IHO and the BSEA. Although the court has the authority to take additional evidence, 20 U.S.C. § 1415(e)-2), the agreement just mentioned and the nature of the additional materials themselves which PJ has offered persuade the court that the proffered new evidence should not be considered in this case. The principal reason for this is that the proffered new evidence relates to the complaints of PJ about the administrative review process by the IHO and the BSEA. This process was impeccable. The materials to which the motion to strike is directed are in large part redundant, and presentation of such material in these circumstances is not warranted. The repetition of and embellishment on PJ's arguments to the BSEA which are of course part of the administrative record this court has considered would not affect the outcome of the review which this court must conduct. The additional material offered by PJ is also permeated with unsubstantiated allegations against the School (based on asserted custom and practice by the School to discourage IDEA and § 504 programming for students). Such allegations have no place in this lawsuit. The School's motion to strike is granted.

III. Administrative Record

A. The Evidence and Findings

The administrative record on which the parties rely shows the following: The IHO's findings are in each instance supported by the evidence presented to him, and are equally supported by a preponderance of the evidence based on this court's independent examination of the record. The one minor factual error contained by the IHO's decision related to the date PJ enrolled in middle school. This error was noted and

corrected by the BSEA, and hence requires no additional exploration here.

In the narrative which follows, there is reference to a "§ 504 hearing" or a "pre-§ 504 hearing," each of which refers to Section 504 of the Rehabilitation Act of 1973. Section 504 protections are available to students who can be regarded in a functional sense as "handicapped," i.e., students who have a physical or mental impairment which substantially limits a major life activity(such as learning), has a record of such an impairment, or is regarded as having such an impairment. See 34 C.F.R. §104.3(j).

PJ was born on December 8, 1980. At the time this action was filed, PJ was enrolled at Zionsville Community High School, which is among the schools administered by Eagle-Union. PJ was first enrolled in the seventh grade at an Eagle-Union middle school in the Spring of 1994. At that time, PJ informed the school of a hazing incident at Park Tudor School, a private school in Indianapolis, which had occurred in January of 1994.

School personnel observed PJ engaged in very unusual behavior during the remainder of his seventh grade and during the eighth grade at the middle school. This consisted of PJ avoiding contact with other students during the seventh grade and of PJ's refusal to enter the cafeteria and being found hiding in the school offices or nurse's room.

PJ entered the high school for ninth grade in August of 1995. On August 25, 1995 the Coordinator of Special Services sent the high school guidance counselor a memo alerting her that PJ had problems at the middle school, but that PJ's parents had not granted the school permission to

evaluate PJ as a child qualifying for a need of services under the IDEA. PJ had a "GEI" while at the middle school, which refers to a general education intervention. As he passed on to the high school, a "red folder" was sent to the high school. This folder alerted the high school guidance counselor that PJ had had GEI plans while at the middle school.

At the high school, PJ was included in a list of students that were part of a systematic § 504 search conducted by the high school guidance counselors during September of 1995. The list included students who had past GEI plans, and students who were tested for special education but were found not eligible. After a review and a narrowing of the list, the parents of those who remained were called by the guidance counselors. PJ's mother was contacted in late September, 1995, and offered an evaluation or services for PJ. This offer was declined, based on PJ's mother's denial that PJ was experiencing any difficulties. In addition, PJ's mother declined to receive a copy of her § 504 rights that was offered to her by the guidance counselor.

PJ's grades improved his freshman year compared to the eighth grade and he made the freshman basketball team. Also during PJ's freshman year, PJ's English teacher observed PJ's hands shaking uncontrollably at the chalkboard. The English teacher talked to the school nurse about the incident. The nurse called PJ's mother, who assured the nurse that the shaking hands were the result of "benign motor tremors" that had been evaluated.

In August, 1996, the school offered PJ a study hall for his sophomore year as part of the school's ISTEP remediation plan. (ISTEP is Indiana's statewide assessment test for students). Students were selected for the study hall based on ISTEP scores which were not acceptable from

grades 6 and 8. PJ and his mother strongly objected to his assignment to the study hall. In November, 1996, PJ was cut from the Junior-Varsity basketball team. The head basketball coach cut PJ because he did not believe PJ had the skill or ability to play at that level of basketball. This action was upsetting to PJ. During this same time period, PJ was tardy to his geometry class four times. After the fourth tardy, School officials met with PJ and his mother; however, PJ's mother did not communicate to School officials that she thought PJ had a disability and that his tardiness might be related to a disability at this meeting.

PJ was tardy for a sixth time on December 4, 1996, and on December 5, 1996, he was "withdrawn" from the geometry class because of tardiness. On December 6, 1996, PJ's mother met with School officials in a meeting the School characterized as a pre-§ 504 conference to discuss PJ's withdrawal from geometry class, and PJ's mother's apparently recent assertion that PJ had a disability. The mother provided no documentation indicating the Student had been evaluated for a disabling condition. PJ's mother was also very upset over the way the school strictly enforced its tardiness rule. During the December 6th meeting, PJ's mother was provided in writing with the procedural safeguards and her parental rights under § 504. According to PJ's mother, the School administrator who excluded PJ from geometry class attempted to hold a "§ 504 Causal Connection hearing" with the intention of upholding the administrator's action. She objected to the meeting, sought reinstatement for PJ, and also sought to have an IHO appointed to hear the matter. She also requested a "stay put" provision to get PJ back into school.

A § 504 conference was scheduled for December 9, 1996. PJ's mother indicated that she believed PJ qualified for

§ 504 protection, because her opinion was that one of the basketball coaches perceived PJ to be disabled. Much of the discussion at this meeting centered on PJ's mother's dissatisfaction over her son being cut from the team. She also indicated that PJ had been unfairly suspended from geometry class. The mother indicated that she wanted to postpone the § 504 conference. That request was granted.

On December 16, 1996, the School's attorney received a letter from PJ's mother. In the letter PJ's mother outlined several issues in regard to the high school's withdrawal of PJ from geometry class. She did not request a § 504 hearing, but did indicate that she and PJ wanted to "exhaust our administrative remedies." Since PJ's mother did not specifically request a § 504 hearing, the School assumed that she was requesting an opportunity to discuss PJ's withdrawal from geometry class with the School Board of Eagle Union Community School District. This item was placed on the agenda for the School Board's scheduled meeting of January 13, 1997.

On January 5,1997, PJ's mother indicated to the School's attorney that she objected to the school board executive session meeting to discuss PJ's situation because she did not believe that the school board could be impartial. On January 13, 1997, she requested a due process hearing relating to her position that PJ was disabled under § 504 and the IDEA, and her further contention that PJ was being excluded without due process from his geometry class and from participation on the junior varsity basketball team.

An IHO was appointed. The hearings were conducted on February 4, 6, 11, and 14, 1997. Thewritten decision ofthe IHOwas issued on Marcn 12, 1997. The time considered by

the IHO, and hence the time period reviewed in this action for review is the period from the Spring of 1994 through February 14,1997.

B. Decisions of the IHO and the BSEA

The IHO found that the School did not fail to adequately identify PJ as being disabled. Neither School officials nor the parents perceived a disabling condition which either adversely affected PJ's educational performance or constituted a substantial limitation on a major life activity. The School developed a GEI plan and did seek permission from PJ's mother in order to evaluate PJ to determine whether or not he required special educatian services, but PJ's mother consistently refused to permit such an evaluation. A parent-provided report from a pediatric neurologist indicated there was no learning disability present. PJ demonstrated academic and social progress such that it could not be said that the School failed to provide an appropriate education to PJ. This conclusion is further supported by the School's development of a GEI plan despite parental intransigence.

The IHO concluded that the School did not violate Article 7 or § 504 when it applied its tardiness policy to PJ and suspended him from geometry class. PJ was not then, nor was he at any time through the date of the BSEA's decision, a student with a disability which either adversely affected his educational performance or substantially limited a major life activity. Likewise, the School did not discriminate against PJ when he was cut from the junior-varsity basketball team.

PJ filed a timely petition for review to the BSEA on May 12, 1997. The petition for review was fully briefed, and

then considered by the BSEA without oral argument, as permitted by Indiana law. In its unanimous decision issued on June 13, 1997, the BSEA upheld the decision of the IHO, after correcting one error in the IHO's Finding of Facts, and also found that there was no denial of due process.

IV. Discussion and Analysis

In addition to his IDEA claim, PJ asserts claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101 etseq., and pursuantto42 U.S.C. §1983.

A. The IDEA

The IDEA provides federal assistance to states, which in turn are required to provide handicapped children with a FAPE. The IDEA imposes procedural safeguards "designed to afford parents or guardians of handicapped children meaningful involvement in the educational placement of their children." Christopher P. by Norma P. v. Marcus, 915 F.2d 794, 800 (2d Cir.1990). PJ argues that there were procedural irregularities in the underlying proceedings, both before the IHO and the BSEA. The IDEA establishes procedural safeguards with respect to the provision of a FAPE. 20 U.S.C. § 1415. Included in those procedural safeguards is the right to an impartial due process hearing by a State or local educational agency for parents or guardians who consider their child's IEP inappropriate. 20 U.S.C. § 1415(b)(2) and (c). An "IEP" is an individualized educational program. PJ and his parents received such a hearing. They were well informed of the nature of the hearing-through both contact with School representatives and through a prehearing conference with the IHO. PJ and his parents were also well

informed of the scope of the hearing, the manner in which it would proceed, the opportunity to present evidence, and so forth. The administrative record admits of no serious doubt that PJ was accorded the due process hearing to which he and his parents were entitled, and that both the hearing and the subsequent steps in the administrative review are untainted by error.

The core of PJ's case, however, is that the School failed to identify him as a disabled child, and to this extent PJ's argument is rooted in the School's alleged noncompliance with the IDEA's "child find" obligations. The IDEA places an affirmative duty on states to ensure that all disabled children who are in need of special education and related services are "identified, located and evaluated." 20 U.S.C. § 1412(a)(3)(A). Indiana has particularized the criteria and procedures for such "child find" efforts at 511 I.A.C. §§ 7-10-1, et seq.

The IHO's complete and careful findings reflect his thorough review of PJ's educational status and the course of contact with and the flow of information from PJ's parents. This review encompassed PJ's school attendance and educational progress at the middle school. The review chronicled the significant events associated with PJ's attendance at the high school in relation to the questions being considered. With respect to the high school years, starting in the Fall of 1995:

• PJ was noted to have a trembling hand in an English class; this information was passed on from the teacher to the nurse, and from the nurse to PJ's parents, who discounted any concern about that event.

• PJ was removed from Geometry class after his sixth tardy, pursuant to a known policy, a policy which had been communicated to PJ and his mother, and as the final step in a series of progressive discipline for PJ being consistently tardy because of his unwillingness to leave an open basketball practice in time to report for class without being tardy.

• PJ played basketball during his freshman year in high school. He tried out for the junior varsity basketball team during his sophomore year. The coach cut him from that team because of his lack of skills, noting that a disparity in skill levels among team members would pose a safety hazard.

It was on the basis of this and other findings, all of which are fully supported by the evidentiary record, that PJ was not determined to be a child eligible for special education and related services under the IDEA. Although Eagle-Union could have pursued a request for PJ's evaluation as IDEA-qualified even without his parents' consent, see20 U.S.C. § 1412(a)(10)(C)(ii), PJ's assertion that it was obligated to seek to compel his evaluation under the above circumstances is logically and legally unsupportable.

The role of PJ's parents in the flow of information to the school and decisionmaking required by the IDEA cannot be overlooked in this matrix. The record before this court shows PJ's parents to be educated, each beyond the level of an undergraduate college degree. PJ's mother has demonstrated familiarity with the IDEA, with the IDEA and § 504 evaluation processes, and with the responsibilities of the states and of a locai educational agency under the IDEA. Nonetheless, PJ's parents deflected, ignored or rejected several initiatives by the School to ev~aluate, or at least explore, PJ's need for educational services under § 504 and

the IDEA. This was especially true during the 1994-95 school year. Nonetheless, a GEI was developed and revised by the middle school, and PJ progressed academically and socially. No diagnosis showing a need for special education and related services was presented to the School. Even allowing for the fact-specific nature of this type of judicial review, this case is very much like Hoffman v. East Troy Community School District, 1999 WL 123310 (E.D.Wisc. March 4, 1999), and a similar conclusion must be reached: the School complied with the child find requirements of the IDEA. It did not err in doing so. See Rodiriecus L. v. Waukegan Sch. Dist No. 60, 90 F.3d 249,254 (7th Cir.1996) ("[It is apparent that the school officials had neither knowledge nor reasonable suspicion to base a rational decision that Rodiriecus L. was in fact disabled."). The decisions of the IHO and of the BSEA were thus in accord with applicable law.1

B. The ADA and the Rehabilitation Act

The IDEA is not an exclusive remedy. 20 U.S.C. § 1415(f). The IDEA is supplemental to the Rehabilitation Act of 1973. See 20 U. S.C. § 1415(fl. The case law interpreting the IDEA has consistently held that this Act does not provide a private cause of action for damages for physical or emotional harm. Smith v. Philadelphia School District, 679 F.Supp.479 (E.D.Pa.1988). Tort liability damages under the IDEA are generally not available. R. v. Board of Education, 546 F.Supp. 1027 (N.D.111.1982), aff'd, 705 F.2d 462 (7th Cir.1983); M.R. v. Milwaukee Public Schools, 584 F.Supp 767 (E.D.Wisc.1984). When damages hava been awarded under the IDEA, they have been limited to reimbursements to parents of the amounts expended to provide educational services to the child. Max M. v. Thompson, 566

F.Supp.1330 (N.D.111.1983).

The ADA and the Rehabilitation Act aim to curtail unlawful discrimination against disabled individuals. While the IDEA is phrased in terms of a state's affirmative duty to provide a FAPE, the Rehabilitation Act is worded as a negative prohibition against disability discrimination in federally funded programs. There appear to be few differences, if any, between the IDEA's affirmative duty and § 504's negative prohibition. See W.B. v. Matula, 67 F.3d 484,492 (3d Cir.1995).

The Rehabilitation Act states:

> No otherwise qualified individual with handicaps . . . shall, solely by reasortof her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

29U.S.C.§794.

To be a qualified individual with handicaps in the context of public education, the regulations provide that persons must only be of an age at which non-disabled persons are provided such education. See 34 C.F.R. § 104.3(k)(2). The regulations implementing the Rehabilitation Act precisely mirror the IDEA's provisions requiring education in the least restrictive environment appropriate. In fact, pertinent regulations provide that one way to complywith the Rehabilitation Act's requirement of providing a free appropriate public education is to implement an IEP developed in accordance with the IDEA. See 34

C.F.R. § 104.33(b)(2).

The ADA prohibits discrimination against qualified individuals with disabilities, as defined in 42 U.S.C. § 12111 (8). The ADA provides, in part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Other courts entering summary judgment on IDEA claims have summarily dismissed accompanying Rehabilitation Act and ADA claims. See, e.g., Hudson v. Bloomfield Hills Pub. Schs., 910 F. Supp. 1291, 1306-07 (E.D. Mich. 1995) Tarah P. v. Board of Educ. of Fremont Sch. Dist. 79, No. 94 C 3896, 1995 WL 66283, at *4 (N.D.III. Feb. 15,1995); Scanlon v. San Francisco Unif/ed Sch. Dist., 1994 WL 860768, at *10-11 (N. D.Cal. Apr. 14,1994), aff'd mem.8 69 F.3d 544 (9th Cir. 1995). That is the course of action which will be followed in this case, because there was no programming at the high school-not Geometry class, and not the junior varsity basketball team-from which PJ was excluded on the basis of his disability or a perceived disability.

C. 42 U.S.C. §1983

PJ claims that he was denied his right to due process under the Fifth Amendment in the course of events which have been chronicled in Part II of this Entry. The court will

assume that PJ is actually intending to invoke the due process guarantee of the Fourteenth Amendment. Love v. Bolinger, 927 F.Supp. 1131, 1 136 (S.D.Ind. 1996).

The premise of PJ's § 1983 claim is that he was denied his right to due process. In turn, his somewhat meager argument on this claim is based on his view of the developments between himself (and his parents) and the School, particularly from December 1995 through the due process hearing with the IHO. Even though there was conflicting evidence in various aspects, PJ's argument of a due process violation dissolves in the face of the record in this action-the record showing that the School complied with IDEA's child find requirements and that procedural protections required by the IDEA and by § 504 were fully observed--and of the "due weight" which the court is compelled to give the findings of the IHO and the BSEA. Board of Educ. of School District 21 v. III. State Board of Education, 938 F. 2d 712, 718 (7th Cir. 1991) (courts are "obligated to give any factual finding that emerges from [the administrative hearing] process deferential 'clear error' review ....).

V. Conclusion

PJ was not determined by the School to be a child qualified under the IDEA. The IHO and the BSEA accorded PJ and his parents meaningful, even exhaustive, review in connection with this determination. This court has independently reexamined the evidence on which those reviews were conducted. "The party challenging the outcome of the state administrative decision bears the burden of proof." Heather S. v. State of Vl/sconsin, 125 F.3d 1045, 1053 (7th Cir. 1997). PJ has not met this burden. The court

therefore affirms the decisions of the IHO and the BSEA, and grants the motion for summary judgment of the defendant, EagleUnion Community School Corporation.

Judgment consistent with this Entry shall now issue.

Although the pleadings and the record in this action have been sealed, the court can discern no reason to seal either this Entry or the accompanying judgment. Accordingly, this Entry and the accompanying Judgment shall not be sealed.

IT IS SO ORDERED.
/s/ JOHN D. TINDER, Judge Date: March 31,1999
United States District Court

1Analytically, it is only the decision of the BSEA which is reviewed in this action, but in this case the BSEA approved the decision of the IHO (except for one correction, already noted), and thus reference is made to the findings and analysis of the IHO.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

PJ, A Minor by his Next Friend,
Plaintiff,
vs. No. IP 97-1144-C-T/G

EAGLE-UNION COMMUNITY
SCHOOL CORPORATION,
Defendant.

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that judgment is entered for the defendant and against the plaintiff, and that the plaintiff take nothing by his complaint.

/s/ JOHN D. TINDER, Judge United States District Court

Date: March 31,1999

Before the Indiana Board of Special Education Appeals

In the Matter of M.S. and Eagle-Union Community School Corporation Article 7 Hearing No. 941-97

Although the Student through his parent-representative has raised numerous issues both at the due process hearing level and onappeal, the core issue has been and remains:

1. Is the Student eligible for special education services under the Individuals with Disabilities Education (IDEA) Act, as implemented in Indiana through the rules and regulations of the Indiana State Board of Education, 511 IAC 7-3 et seq. ("Article 7")?

2. If not, does the Student have a substantial limitation of a major life activity such that he is disabled or is considered disabled, precluding discrimination based upon the existence of a disability? This is a claim in the alternative under Sec. 504 of the Rehabilitation Act of 1973 as implemented by 34 CFR Part 104.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the parent or parents of the Student. January 13, 1997 The parent requested a hearing for the Student, alleging he is disabled under both Sec. 504 and IDEA, and further alleging the Student was being excluded without due processfrom

geometry class and from participation on the junior varsity basketball team.

January 15, 1997 Joseph R. McKinney, J.D., Ed.D., was appointed Independent Hearing Officer (IHO) under 511 IAC 7-15-5. January 16, 1997 A prehearing conference was conducted by telephone. The following issues were established:

1. Whether the Eagle-Union Community School Corporation ("School") failed to adequately identify the Student as a child in need of special education services and then failed to evaluate his disabling condition.

2. Whether the School failed to adequately identify the student as a child with a disability under Sec. 504 of the Rehabilitation Act of 1973 and then failed to evaluate his disabling condition.

3. Whether the School violated Article 7 and/or Sec. 504 when it suspended or otherwise excluded the Student from his geometry class.

4. Whether the School prevented the Student from participating in interscholastic sports, thus violating Sec. 504 and/or Article 7.

5. Whether the School provided the parents procedural due process under Sec. 504 and/or Article 7.

The parties also agreed the IHO would have jurisdiction over Sec. 504 issues as well as Article 7 issues.(1) January 29, 1997 was established as the date for exchange of witness and exhibit lists. Initial hearing dates were set for February 4 and 6, 1997. The hearing site was set at the parent's office. The prehearing conference was transcribed into a 31-page document. January 23, 1997 The IHO's written prehearing order was issued. The IHO also sent out a

hearing notice establishing the date, time and place for the hearing, beginning on February 4, 1997. A complete recitation of the hearing rights accompanied the hearing notice.

January 28, 1997 The School filed a "Draft" Motion to Separate Issues and for a Continuance of the Hearing so as to separate the issues. The thrust of the "Draft" Motion was to request the IHO to address the issues in a somewhat chronological manner, beginning with the evaluation and placement issues and then, if necessary, to address whether accommodations were or are necessary for the geometry class and for extracurricular activities. In the transmittal letter with the Motion, the School also requested reconsideration of the site for the hearing, urging the hearing be moved to a school facility to accommodate an expected large number of witnesses, especially teachers. The IHO treated the transmittal letter as a Motion and denied it.(2) The due process hearing was conducted over four days--February 4, 6, 11, and 14, 1997. The parties agreed to extend the time for the issuance of the written decision to March 12, 1997. The written decision was issued on that date.

The IHO's decision generally noted the Student (d/o/b 12/8/80) is a sophomore attending the local high school. The Student had attended a private school, but following a serious hazing incident during the 7th grade, the Student became withdrawn and refused to return to the private school. He was enrolled in the public school, but engaged in unusual behavior during his 7th and 8th grade years, such as avoiding contact with other students, refusing to enter the cafeteria, and hiding in the school offices or the nurse's room.

His academic performance declined following the hazing incident. School officials observed the Student's behavior and

advised the parents of possible suicidal ideation. On November 21, 1994, the School referred the Student for a comprehensive evaluation to determine eligibility for special education services. The parent refused permission for the evaluation. The parent was advised of parental rights under Article 7, including procedural safeguards. On February 27, 1995, the parent provided written permission for the evaluation; however, when school officials met with the parent on February 28, 1995, to obtain a developmental history and explain the evaluation procedures, the parent withdrew permission for the evaluation. Nevertheless, the School developed and implemented a General Education Intervention (GEI) plan (see 511 IAC 7-10-2) for the remainder of the 1994-1995 school year. The parent reiterated opposition to a special education evaluation at a meeting with school officials on March 21, 1995, although the parent participated in this meeting by reviewing and revising the GEI plan. The parent provided additional recommendations on April 24,1995 [this reads "April 24, 1997" in the decision], but did not respond to an April 10, 1995, request by the School to permit the evaluation.

The parent on March 30, 1995, provided the School with a report from a pediatric neurologist, who concluded the Student's problems are not the result of a learning disability. The parent was concerned about confidentiality, and requested the report not be maintained in the Student's educational record.

The student entered 9th grade at the high school in August of 1995. The middle school apprised high school officials of the Student's involvement and their concerns. High school officials included the student in their "child find"

procedures for Sec. 504. [See 34 CFR ¤104.32.] The guidance counselor contacted the parent in September of 1995, but the parent denied the Student was experiencing any difficulties and declined receipt of a copy of Sec. 504 rights. The Student's academic performance did improve during his freshman year, and he made the freshman basketball team. However, the Student's English teacher observed the Student's hands shaking uncontrollably at the chalkboard. The parent dismissed these concerns as "benign motor tremors."

The student was offered a study hall for his sophomore year as a means of providing remediation based upon his ISTEP scores. [See,generally, I.C. 20-10.1-17 for remediation grant responsibilities for students who do not perform acceptably on the Indiana Statewide Testing for Educational Progress, a statewide assessment known as "ISTEP."] The Student and parent objected to the study hall. In November of 1996, the Student was cut from the junior varsity basketball team. The basketball coach did not select the Student because he did not believe the Student possessed the requisite skill or ability to play basketball at that level. The basketballcoach did not "believe or perceive the Student to have a disability." The parent "was very upset that the Student did not make the basketball team." The Student was tardy several times to his geometry class.

Following his fourth tardy, School officials met with the parent. The parent did not express an opinion that the Student may have a disability or that there may be a relationship between a disabling condition and the tardiness. The Student was tardy for the sixth time on December 6, 1996, and was suspended from the class. School officials and the parent met on December 6 and December 9, 1996, during which time the

parent was advised of parental rights under Sec. 504. Although the Student had been receiving individual and family counseling on a regular basis from a licensed clinical psychologist from June 1994 to June 1996, the psychologist's reports were not shared with School officials until this due process hearing. The Student had been seen for depression (single episode, severe) and a generalized anxiety disorder. However, the therapy was terminated as the Student's academic and social progress improved (IHO Findings of Fact Nos. 1-51).

Based upon the above-referenced Findings of Fact, the IHO concluded the School did not fail to adequately identify the Student as being disabled. Neither School officials nor the parents perceived a disabling condition which either adversely affected the student's educational performance [see 511 IAC 7-3-4] or constituted a substantial limitation on a major life activity [see 34 CFR¤104.3(j)]. The School did develop a GEI plan and did seek permission from the parent in order to evaluate the Student to determine whether or not the Student did require special education services, but the parent consistently refused to permit such an evaluation. A parent-provided report from a pediatric neurologistindicated there was no learning disability present. The student demonstrated academic and social progress such that it cannot be said the School did not provide an appropriate education to the student. This conclusion is further supported by the School's development of a GEI plan despite parental intransigence.

The IHO also concluded the School did not violate Article 7 or Sec. 504 when it applied its tardiness policy to the Student and suspended him from the geometry class. The Student was not then, and is not now, a Student with a

disability which either adversely affects educational performance or substantially limits a major life activity. Likewise, the School did not discriminate against the Student when he was cut from the basketball team. The School did provide the parent with notice of the parent's rights under Sec. 504 and Article 7, and the School's procedures for establishing a system of procedural safeguards are consistent with the requirements of Sec. 504. The IHO advised the parties of their right to appeal and further advised them of the exact procedures for doing so.

PROCEDURAL HISTORY OF THE APPEAL

Although the IHO's written decision was issued on March 12, 1997, the parent requested on March 18, 1997, an extension of time to prepare a Petition for Review.(3) The Indiana Board of Special Education Appeals (BSEA) on March 24, 1997, granted the request, permitting the parent to prepare and file a Petition for Review by the close of business on May 12, 1997. The BSEA also advised the parent of the specific procedures the BSEA employs for filing of all pleadings and correspondence directed to the BSEA. The BSEA also extended to June 30, 1997, the time within which it must conduct review and issue a written decision.

On May 5, 1997, the parent filed a "Motion to Submit Newly Available Evidence," which was restyled by the BSEA as a "Motion to Submit Newly Discovered Evidence." The Motion purports that there is available medical evidence that the Student does have a disability. The BSEA, by order dated May 7, 1997, took the matter under advisement so as to permit the School to respond to the Motion. The BSEA deferred ruling on the Motion until it conducts its review of the record.(4) The parties were notified by copy of a May 5,

1997, memorandum from the General Counsel for the Indiana Department of Education of the BSEA's standards for receiving and considering "newly discovered evidence." Notwithstanding the above, the parent filed on June 6, 1997, two additional Motions, one regarding allegedly "newly discovered medical evidence" and the other "newly discovered evidence of LEA communication with State Agency Official." The latter motion will be discussed later. The parent also filed a fourth Motion on June 12, 1997. This Motion is supposedly "newly discovered evidence" but it actually addresses the parent's desire to clarify statements attributed to the clinical psychologist who treated the student. The BSEA rulings on these Motions appear below.

The BSEA notified the parties by order dated May 27, 1997, that it would conduct its review on June 12, 1997, beginning at 1:00 p.m.,but without oral argument and without the presence of the parties.511 IAC 7-15-6(k). However, the BSEA notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript will be sent to the representatives of the parties when available.

Student's Petition for Review

The Student's Petition for Review was timely filed on May 12, 1997. The Student took exception to certain Findings of Fact, all Conclusions of Law, and "certain orders," although the latter was never clarified further. The Student also claimed that procedural errors were committed by the IHO, which constituted a denial of due process. Although the Student refers to "504 / IDEA" throughout his Petition for

Review, the BSEA is mainly concerned with issues related to IDEA, 20 U.S.C. ¤1400 et seq., 34 CFR Part 300, as implemented in Indiana through Article 7. In most critical situations, compliance with IDEA procedures is considered sufficient compliance with Sec. 504 requirements. Cf. ¤¤104.33(b)(2), 104.36. The Student appears to make the followingclaims:

Denial of Due Process

1. The federal district court judge who denied the Student's request for injunctive relief prior to the initiation of this action is related to the IHO. The IHO should have disqualified himself.

2. The IHO engaged in improper ex parte communication with the parties, and failed to document such contacts in the record.

3. The Student was prevented from obtaining legal representation.

4. The IHO failed to order the Student to remain in his current educational placement ("stay put").(5)

5. The IHO sustained objections by the School, preventing the Student's presentation of expert testimony on his behalf.

6. The IHO violated the Student's physician-patient privilege with respect to certain psychiatric records.(6)

7. The IHO failed to issue subpoenas at request of the Student's parent.

8. The IHO did not declare a recess when the Student's parent became upset.

9. The IHO did not timely file the record with the Indiana Department of Education, thus preventing the Student from adequately reviewing the record in order to prepare a

Petition for Review.

10. The IHO failed to maintain proper decorum. The Student also alleges several procedural errors against the School, especially the School's attorney, which the Student claims instructed School personnel not to have additional discussions with the Student's parent, but instead to refer all such inquiries to his attention. It is not clear how this violates IDEA , but it is clearly not an issue raised at the hearing below. Accordingly, this issue will not be addressed on review. 511 IAC 7-15-6(h).

IHO's Findings of Fact

The Student takes exception to the following Findings of Fact (FOF)determined by the IHO. When necessary, the actual FOF is reproduced parenthetically following the objection.

1. The Student objects to a factual error in FOF No. 9, which should indicate the parents moved in 1994 and enrolled the Student in the School in the Spring of 1994.

2. FOF No. 20 is allegedly misleading in that the IHO did not emphasize that the Student's parent gave permission for an evaluation. ("School personnel continued to meet and discuss the Student's problems at school. The school stayed in contact with the mother. On February 27, 1995, the school psychologist received a letter from the mother authorizing a "special needs" evaluation.")

3. FOF No. 22 is allegedly misleading in that the Student's parent objected to the qualifications of the School's evaluator and continued a request for the School to provide a clinical psychologist. ("The mother refused to give consent to allow the school to evaluate the Student at the February 28, 1995 meeting. The mother expressed concerns about

"labeling" and the effect it could have on enrolling the Student in another private school.")

4. FOF No. 23 is allegedly factually incorrect . However, the Student does not state what portion of FOF No. 23, which addresses the GEI plan, is incorrect.

5. FOF No. 29 allegedly ignores the treating physician's observation that social isolation is the Student's major disability which presents educational problems. ("Dr. Dunn, who specializes in pediatric neurology at Rile Hospital[,] concluded on March 30, 1995 that the Student's difficulty in school was not the result of a learning disability. The letter indicated that the Student's problems at school were a result of his difficulties interacting with others.")

6. FOFs Nos. 33, 37, 38, 39, 40, 41, 43, 44, 45, and 47 are allegedly only partially correct, reveal bias on the part of the IHO, and are not supported by a preponderance of evidence. However, the Student does not indicate which portions are incorrect nor how such findings reveal any bias. Whether or not such FOFs are supported by testimony and documentary evidence will be determined by the BSEA below.

7. FOF No. 51 is in error and unsupported by the record. ("The mother's testimony that she requested an impartial Section 504 due process hearing in December was not persuasive in light of the written correspondence in December and January between the mother and school.")

IHO's Conclusions of Law

As noted above, the Student objects to all eight of the Conclusions of Law determined by the IHO. The Student argues that the evidence and testimony should have resulted in conclusions of law which held that the Student was disabled under IDEA and Sec. 504; that school personnel, including

teachers and the school nurse, suspected the Student might be disabled (social isolation, academic failure, neurological impairment, seizure disorders) and should have referred the Student for an evaluation; failure to evaluate the Student during the 1994-1995 school year violated IDEA when the School did not seek to overcome parental intransigence by requesting a due process hearing [see 511 IAC 7-10-3(s) and 34 CFR¤300.504(b),(d) and Notes 2,3]; that the School violated IDEA when it failed to develop an individualized education program (IEP) and violated Sec. 504 when it failed to implement a Sec. 504 educational plan [see ¤104.35(c)]; and the School failed to provide the parent with adequate notice of procedural safeguards under IDEA and Sec. 504, and the School actively sought to prevent the parent from understanding these rights.

The above summarizes the Student's objections to the Conclusions of Law. There is apparently a general grievance with the IHO's receiving into evidence and considering a "504 Telephone Script" (Appendix B). Following these objections is a somewhat lengthy "Fact Summary," which includes other possible objections, but these were not raised. Hence, the Student did not wish for these to be reviewed

As noted above, the Student's parent has filed four (4) separate Motions, two seeking to submit allegedly "newly discovered evidence," but the other two are different. One Motion actually seeks to impeach a School official for writing to the Assistant Director of the Division of Special Education, Indiana Department of Education (IDOE), following the initiation of the due process hearing. This Motion is disingenuous for several reasons: (1) The IDOE has never been a party to this proceeding. A review of the record

indicates that both parties--especially the parent--wrote letters to the IDOE. This internal correspondence of IDOE was combined with the official record when the IHO filed same with the IDOE. There is no indication that the IHO ever saw these letters or considered them during the hearing or while writing the decision.(2) The parent reviewed on May 9, 1997, the official record in the offices of the IDOE's General Counsel and obtained copies of these letters before filing the Petition for Review. There is no explanation given why this wasn't included with the Petition for Review. As a consequence, the BSEA will not consider this Motion as it isn't timely nor is it relevant. Likewise, the BSEA will not consider the Motion filed on June 12, 1997, well after the Petition for Review and the School's Response were filed. This Motion seeks to "clarify" the record. This is not "newly discovered evidence" but is a lack of due diligence. The BSEA will not consider the Motion filed on June 12, 1997.

School's Response to the Petition for Review

The School timely filed its Response to the Petition for Review and to the Motion to Submit Newly Discovered Evidence (at that time, there was only one such Motion). In summary, the School argues: 1. The "newly discovered evidence"--a letter from a physician--does not meet the standard for newly discovered evidence because such a statement could have been produced before or during the four days of testimony. The physician was listed as a witness by the Student but was never called to testify. The attempt to submit such testimony after the fact deprives the School of its right to cross examine the physician 2. The Petition for

Review is "rambling and disjointed," making it difficult for the School to respond. 3. The Student's parent possesses a law degree but does not practice law. She consulted with several attorneys regarding possible representation. One attorney initiated representation but then later withdrew. The IHO never advised against representation or otherwise prevented the Student from being represented. On the contrary, the IHO "showed incredible restraint and patience" with the Student's parent-representative.4. There was a considerable amount of testimony and documentary evidence, some of it contradictory. The IHO must decide which evidence is credible. The hearing was full and fair to all parties. 5. The record supports the IHO's written decision in all respects.

While the Student requested oral argument, the School asked that this matter be reviewed without oral argument. This is a matter within the discretion of the BSEA. The BSEA decided this matter should be reviewed without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). Review was set for Thursday, June 12, 1997, in the Board Room, Room 225, State House, Indianapolis, beginning at 1:00 p.m.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on June 12, 1997, to conduct its review of the above-referenced matter. All members were present and had reviewed the record, the Petition for Review, the Response thereto, and the Motions filed by the Student's parent. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.

2. The four (4) Motions filed by the Student in an attempt tt submit newly discovered evidence are denied. The proffered information does not meet the test of "newly discovered evidence" under I.C. 4-21.5-3-31(c) because the information could have been discovered through due diligence of the Student's representative. In addition, the information was neither material nor relevant; was cumulative at best; and would not have changed the outcome of the hearing even if timely provided.

3. The BSEA agrees with the Student that the IHO made a factual error in Finding of Fact No. 9, but further finds that such error was inconsequential. The Finding of Fact is revised to read as follows:

9. In the Spring, 1994, the parents moved to Zionsville and enrolled the Student in the school district. The mother informed the school of the hazing incident and the school made a report of institutional abuse to the Boone County Welfare Office.

4. The BSEA finds no merit to the parent's allegations that the IHO erred in Findings of Fact Nos. 20, 22, 23, 29, 33, 37, 38, 39, 40,41, 43, 44, 45, and 47. The record amply supports the IHO's findings that School personnel continued to meet and discuss the Student's school problems; that School personnel received on February 27, 1995, a letter from the parent authorizing a "special needs" evaluation but that the parent refused at a meeting on February 28, 1995, to give the consent based upon concerns about "labeling" and the effect

this might have on the Student's possible enrollment in another private school; that the School developed a GEI plan for the Student to assure his successful participation in general education classes, and that the School revised the GEI plan during Winter/Spring of 1995; that teachers met at least five times with the school psychologist or guidance counselor to discuss the Student's past problems and progress; that the IHO correctly summarized the statement of the pediatric neurologist; that the high school guidance counselor called the parent of the Student in late September of 1995 to offer an evaluation or services to the Student, but was advised by the parent that the Student was no longer experiencing any problems; that the parent during this conversation was offered a copy of her rights under Sec. 504, but she declined same; that the Student was cut from the junior varsity basketball team because of a lack of skill and not because of a disability; that the School withdrew the Student from the geometry class pursuant to its tardy policy; that the parent and the School met on December 6, 1996, in what was described as a "pre-504"meeting to discuss the geometry class and the unsubstantiated claim by the parent that the Student was disabled; that at this meeting the parent was provided in writing her procedural safeguards and parental rights under Sec. 504; that a report from a clinical psychologist presented by the parent at the hearing but not previously shared with the School indicated that the Student had been seen for individual and family counseling on a regular basis from June of 1994 to June of 1995 for depression and a generalized anxiety disorder, and was making progress in his therapy and medication such that the therapy was discontinued; that the clinical psychologist noted academic improvement such that

there was, in his opinion, "no need for special education programming"; that the Student was not referred for an educational evaluation by either the parent or the School during his freshman and sophomore years until he was withdrawn from geometry due to excessive tardiness; and that the parent did not request a Sec. 504 hearing; that it was reasonable for the School to assume the parent was challenging the disciplinary action taken.

5. The IHO's eight (8) Conclusions of Law are based upon testimony presented and documentary evidence submitted, which the IHO had reduced to fifty-one (51) Findings of Fact. The BSEA upholds the IHO's Conclusions of Law, which found that the School did not fail to adequately identify the Student as disabled under either IDEA or Sec. 504, nor did the School fail to initiate evaluation procedures; the School did not deny a free appropriate public education to the Student; that the School did develop an individualized plan under the General Education Intervention procedures of 511 IAC 7-10-2 and monitored his progress; the withdrawal from the geometry class due to violation of the excessive tardy policy did not violate either IDEA or Sec. 504 because the Student is not disabled under either law for educational reasons; the School did provide the parents with procedural due process under IDEA and Sec. 504; and the School has established a system of procedural safeguards in compliance with Sec. 504.

6. The Student was not denied due process by the fact that the federal district court judge who considered the Student's request for injunctive relief happened to be related to

the IHO who was eventually appointed to consider the matter. An IHO is an administrative law judge and would not be reviewing any decision of a federal district court judge. The appearance of impropriety would be a concern should the federal district court judge receive this dispute under judicial review provided by 20 U.S.C. ¤1415(e) and 511 IAC 7-15-6(p). It is not a concern of this IHO.(7)

7. An IHO may find it necessary to have ex parte discussions regarding procedural matters only, although all such discussions are discouraged because they are fraught with peril. However, the Student does not state--and it is not the BSEA's duty to guess--what ex parte conversations took place which were not documented in eventual orders, or how such conversations, if they occurred, were prejudicial to the Student. There has been no denial of due process

8. The Student was not prevented from obtaining legal representation. The record contains numerous instances where the parent indicated she had sought or was seeking legal representation. The Student's representative offers no proof whatsoever that the IHO prevented her in any way from securing representation of her own choosing.

9. The IHO did not fail to order the Student to remain in his current educational placement. In fact, he issued such an order,placing him back in the geometry class whereas at the time of the hearing request, his "current educational placement" would not have included the geometry class.

10. The Student's parent alleges that the IHO's sustaining of objections by the School prevented the testimony of an expert witness. However, the parent does not provide sufficient detail in order for the BSEA to know what objections were made by whom, when, and towards whose

testimony. A review of the record as a whole does not indicate that the IHO acted in any arbitrary or capricious manner in considering such Motions. The Student was not denied due process.

11. The IHO did not--and could not--violate any physician-patient privilege the Student may have. The parent requested the hearing and placed the Student's medical condition at issue. The IHO issued two separate orders in response to the parent's concerns regarding confidentiality. It is inconceivable how the IHO could have breached any privileged relationship the Student may have had, and the Petition for Review provides no elaboration. The Student has not been denied due process.

12. The Student's parent does not state how or when the IHO refused to issue a subpoena at the parent's request, nor does the parent state to whom the subpoena was intended. A Petition for Review has to be specific. 511 IAC 7-15-6(e)(3). This is not specific enoughand precludes meaningful review by the BSEA. The Student has not been denied due process.

13. The conduct of the hearing is within the purview of the IHO. Whether or not the IHO grants recesses or continuances is within the IHO's discretion, subject to review if there is an abuse of that discretion. In this case, the IHO declined to recess the hearing--which had already consumed several days of testimony--and otherwise continue the proceeding because the parent became upset. The BSEA finds that the IHO had sufficient reason to decline the request, and did not abuse his discretion when he denied it. The Student has not been denied due process.

14. The IHO did not fail to timely file the record with

the Indiana Department of Education, Division of Special Education. As the Procedural History indicates, the parent sought documents shortly after receiving the IHO's written decision. The written decision is sent by certified mail. 511 IAC 7-15-5(t). In any case, the parent sought and was granted a generous extension of time to May 12,1997, to prepare and file a Petition for Review. The parent has not alleged, much less shown, how the Student was denied due process based upon when the record is filed with the Indiana Department of Education. There is no denial of due process.

15. There is absolutely no evidence in record to support an allegation that the IHO failed to maintain proper decorum. The Student has not been denied due process.

16. The BSEA will not review the allegation that the School's attorney improperly restricted communications between the parent and School personnel. This issue was never raised at the hearing below and will not be reviewed now. 511 IAC 7-15-6(h).

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The decision of the IHO is upheld in all respects except as to the editorial error in Finding of Fact No. 9, which is hereby corrected (see BSEA's FOF No. 3, supra).

2. All four (4) Motions submitted by the Student's parent are denied.

3. The Student was not denied due process.

4. All other Motions not specifically addressed herein are hereby deemed denied.

Date: June 13, 1997 /s/ Richard L. Therrien

Richard L. Therrien, Chair

Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).

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1. It is unusual for an IHO appointed under Article 7/IDEA to consider claims in the alternative under Sec. 504. However, in this matter, the parties requested the IHO to do so. As a consequence,the Board of Special Education Appeals (BSEA) has jurisdiction toaddress the same issues. Compliance with IDEA procedural safeguardsis deemed compliance with Sec. 504 requirements. See 34 CFR ¤104.36.

2. Even though Article 7 requires that due process hearings be conducted "at a time and place reasonably convenient to all parties to the hearing," 511 IAC 7-15-5(n), the federal law requires that"[e]ach hearing...must be conducted at a time and place that is reasonably convenient to the parents and child involved." 34 CFR¤300.512(d). App.50

Indiana's regulatory provision, then, is an ideal andnot a strict mandate where, as here, the parent of the child andthe school are in disagreement as to what is "reasonably convenientto the parents and the child." Under such circumstances, thefederal law dictates.

3. The parent expressed confusion between Article 7 and Sec. 504 issues and time lines. The parent also complained that she had been unable to obtain a copy of the transcript and, essentially, the entire record so that she could share them with an attorney. She also inquired whether disability organizations could file an amicus brief in the matter. By letter dated March 21, 1997, General Counsel for the Indiana Department of Education advised the parent:

(1) a copy of the transcript would be sent to her;

(2) the record will be made available for her inspection but will not be copied;

(3) the parent needs to clarify how much additional time she requires to prepare a Petition for Review;

(4) it is discretionary with the BSEA whether or not to permit a third-party to file anamicus brief;

(5) IDEA procedures will dictate the time line for the conduct of the review; and

(6) whether or not the BSEA permits oral argument is discretionary with the BSEA.

4. BSEA procedures are governed, to the extent not in conflict with federal law, by the Administrative Orders and Procedures Act, I.C. 4-21.5-3. See 511 IAC 7-15-6(d). I.C. 4-21.5-3-31(c) requires a party submitting newly discovered evidence to demonstrate that such evidence is "material" and could not have been discovered through due diligence of the party and produced at the hearing below. The BSEA interprets

"material" to mean such evidence is relevant, not merely cumulative, not merely impeaching, not privileged or incompetent, credible, and reasonably likely to change the outcome of the hearing. See Article 7 Hearing No. 777-94.

5. The BSEA notes that there are several Motions and resulting Orders from the IHO which are not included in his written decision but are included in the official record. One such order, dated February 14, 1997, orders the Student reinstated in his geometry class, effective January 16, 1997.

6. Again, the IHO's written decision did not include any Motions or Orders with respect to confidentiality, but the official record contains two Orders. One Order is dated February 11, 1997, and orders that all medical information submitted in the hearing is to be treated as confidential and is to be maintained as confidential information "as required by law." The second Order, issued on February 14, 1997, orders the School "to seal and maintain sealed psychological evaluations and records that were disclosed in incamera proceedings in response to a judicially authorized subpoena." An IHO in Indiana has the authority to issue subpoenas, discovery orders, and protective orders in accordance with the rules of procedure governing discovery, depositions, and subpoenas in civil court actions. I.C. 4-21.5-3-22(a).

7. In fact, this has occurred previously. In D.F. v. Western School Corporation, 921 F. Supp. 559 (S.D. Ind. 1996), the parents sought judicial review of an adverse decision by the BSEA in Article 7 Hearing No. 713-93. The IHO was Dr. Joseph McKinney. The federal judge who first received the assignment was Judge Larry McKinney. Judge McKinney recused himself because of the familial relationship, and the matter was determined by another federal

district court judge.

Constitutional Provisions, Statutory and Regulations Involved

Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.§1400 *et seq.*)

Article 7 Indiana's regulations implementing IDEA.
511 IAC 7 et seq. Ind. Administrative Code title. 511, r. 7 et seq. indicating that the procedural safeguards attach when a student is referred for an educational evaluation and not when the student is found eligible for such services, 511 Indiana Administrative code 7-15-2(O)

§504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) ("Section 504") discussing "has disability" or " history of disability",

The Americans with Disabilities Act (42 U.S.C.§12100 *et seq.*) ("ADA"),

and the Due Process Clause of the Fourteenth Amendment through 42 U.S.C. §1983.